

**BEFORE THE
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION**

In the Matter of:

**TITAN MOVING AND STORAGE, INC.,
DBA DEATHWISH PIANO MOVERS,**

Respondent.

**Docket No. FMCSA-2008-0387¹
(Eastern Service Center)**

ORDER DENYING PETITION FOR RECONSIDERATION

1. *Background*

On October 24, 2008, the Massachusetts Division Administrator of the Federal Motor Carrier Safety Administration (FMCSA) served a Notice of Claim (NOC) on Titan Moving and Storage, Inc., dba Deathwish Piano Movers (Respondent).² The NOC, based on a July 28, 2008, vehicle inspection, charged Respondent with one violation of 49 CFR 392.9a(a)(1)/14901(d)(3), operating without the required operating authority, with a proposed civil penalty of \$25,000.

After Respondent failed to respond to the NOC, the FMCSA's Field Administrator for the Eastern Service Center (Claimant) served a Notice of Default and Final Agency Order (NDFAO) on November 28, 2008.³ The NDFAO advised Respondent that the NOC would become the Final Agency Order in this proceeding

¹ The prior case number was MA-2009-0006-US1265.

² See Exhibit A to Field Administrator's Response and Opposition to Petition for Reconsideration (hereafter Claimant's Response).

³ See Exhibit B to Claimant's Response.

effective December 3, 2008, with the civil penalty immediately due and payable on that date.

On December 4, 2008, Respondent served a Petition for Reconsideration.⁴ Respondent stated that after receiving the NOC it applied for and obtained the necessary operating authority.⁵ According to Respondent, its diligence in taking corrective action was a meritorious defense warranting vacation of the Final Agency Order. Moreover, Petitioner contended that its failure to reply to the NOC was excusable because it believed “the filing of the registration fulfilled any notice requirement.”

In his Response to the Petition served December 10, 2008, Claimant contended that the Petition should be denied because Respondent failed to timely respond to the NOC and did not present sufficient grounds for vacating the Final Agency Order.

2. Decision

It is undisputed that Respondent did not reply to the NOC within 30 days of service of the NOC, as required by 49 CFR 386.14(a).⁶ Therefore, it defaulted. Under 49 CFR 386.64(b), a Notice of Default and Final Agency Order issued by a Field Administrator based on failure to timely reply to the NOC may be vacated if Respondent

⁴ See Exhibit C to Claimant’s Response.

⁵ On December 5, 2008, Respondent served an Amended Petition for Reconsideration attaching evidence that its operating authority was reinstated effective November 4, 2008.

⁶ The NOC reply deadline was November 28, 2008. This date was calculated by adding 30 days to the October 24, 2008, service date of the NOC and an additional five days because the NOC was served by mail. *See* 49 CFR 386.8(c)(3). Although the NDFAO was issued one day prematurely, this was harmless error because Respondent did not serve a reply on November 28.

can demonstrate, in a timely filed Petition for Reconsideration, excusable neglect, a meritorious defense, or due diligence in seeking relief.

Respondent has not met its burden of demonstrating that the Final Agency Order should be vacated. Respondent's explanation for failing to respond to the NOC—that it believed abatement of the violation was a sufficient response—does not establish excusable neglect. Respondent's argument indicates that it did not take the trouble to read the entire NOC. Page 6 of that document clearly states, in upper case letters, that Respondent must serve a written response to the NOC within 30 days and that failure to serve a timely reply may result in the issuance of a notice of default and final agency order declaring the NOC, including the civil penalty proposed therein, to be the final agency order in the proceeding. Respondent's failure to heed this unambiguous warning, regardless of whether or not it abated the violation, is not excusable neglect. Moreover, post-violation corrective action in response to an NOC is an admission that the violation occurred, not a defense to the violation. Consequently, Respondent did not present any meritorious defenses.

Section 386.64(b) authorizes—but does not require—the Assistant Administrator to vacate the Final Agency Order if Respondent acts with due diligence in seeking relief.⁷ Although Respondent arguably acted with due diligence by filing its Petition for Reconsideration within one week after receiving the NDFAO, it would be an empty

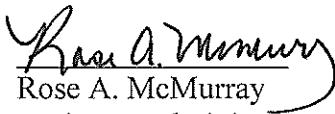
⁷ Respondent misconstrued the meaning of due diligence in its petition. Due diligence, in the context of vacating a final agency order under § 386.64(b) means due diligence in seeking relief from the final agency order, not due diligence in abating the violations.

exercise or futile gesture to vacate the Final Agency Order if Respondent is unable to demonstrate a meritorious defense.⁸

Therefore, the default stands and the Notice of Claim, including the proposed civil penalty assessment, is final. The essence of a default is a failure on the part of the motor carrier or driver to participate in the proceedings when required to do so.⁹ Having failed to participate in these proceedings within the time limit set by law, it is too late for Respondent to now be heard.¹⁰

The Petition for Reconsideration is denied. The Notice of Claim is the Final Agency Order in this proceeding.¹¹

It Is So Ordered.


Rose A. McMurray

Assistant Administrator

Federal Motor Carrier Safety Administration

1-7-10
Date

⁸ See *In the Matter of Wells & Wells Equipment, Inc.*, Docket No. FMCSA-2006-25836, Order on Reconsideration, October 8, 2008, at 5.

⁹ See *In the Matter of Parcel Shipper's Express, Inc.*, Docket No. FMCSA-2000-9523, Order, May 25, 2001, at 3.

¹⁰ *In the Matter of Kent Ness dba Ness Harvesting*, Docket Nos. FMCSA-2000-8111 and FMCSA-2002-11610, Order Denying Petitions for Reconsideration, March 15, 2002.

¹¹ The November 28, 2008, NDFAO stated that the \$25,000 civil penalty was due and payable on December 3, 2008, the date that the NOC would become the Final Agency Order. Because Respondent petitioned for reconsideration on December 4, 2008, the clock on the effective date of the Final Agency Order was not stayed by the petition. Therefore, the civil penalty is due and payable immediately. Respondent should consult the NDFAO for payment instructions.

CERTIFICATE OF SERVICE

This is to certify that on this 8 day of January, ²⁰¹⁰2009, the undersigned
mailed or delivered, as specified, the designated number of copies of the foregoing
document to the persons listed below.

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